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No. 90-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL L. MEDLOCK, *et al.*,

Petitioners,

—against—

JAMES C. PLEDGER, COMMISSIONER OF REVENUES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF AMICUS CURIAE OF DOW JONES & COMPANY, INC. IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF DOW JONES & COMPANY, INC. IN SUPPORT OF PETITIONERS

This brief is respectfully submitted, with the consent of the parties, pursuant to Rule 37.3 of the Rules of this Court, urging reversal of the decision below of the Supreme Court of Arkansas to the extent that it approved taxation of petitioners-taxpayers from and after July 1, 1989, on the grounds that the First and Fourteenth Amendments to the Constitution of the United States forbid such taxation in light of Arkansas' exemption from sales and use tax of much of the remainder of the press.

Amicus particularly urges that this Court's consideration of No. 90-38 take into account the issues raised by cases such as *Commissioner of Revenue of Tennessee v. Newsweek, Inc. et al.*, No. 90-273, *pet. for cert. pending*.

This brief does not address the issue which *amicus* views as most squarely posed by No. 90-29 (the petition consolidated with the instant petition), namely whether the taxation by the states of cable (and even perhaps broadcast) television is somehow outside the rule of *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).[1]

Plenary consideration of the issues raised in No. 90-38, however, may require that this Court answer the question ostensibly reserved in *Arkansas Writers' Project*: "whether a distinction between different types of periodicals presents an additional basis for invalidating the sales tax as applied to the press." 481 U.S. at 233. As set forth *infra*, *amicus* believes that an affirmative answer to this question is actually compelled by both the language and the logic of *Minneapolis Star* and *Arkansas Writers' Project* themselves. It is this issue to which this brief is addressed.

INTEREST OF AMICUS

Amicus Dow Jones & Company, Inc. is perhaps best known as the publisher of *The Wall Street Journal*, the largest circulation daily newspaper in the country. But Dow Jones also publishes, *inter alia*, the Dow Jones News Services, a group of traditional news wire services; Dow

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[1] *Amicus* notes that this Court has suggested that greater burdens on expression otherwise protected by the First Amendment may be permissible with respect to these regulated media. *E.g., City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984). We fail to understand, however, how the rationale of cases such as *Preferred Communications*, centering on access to utility poles and underground conduits, undercuts that of *Minneapolis Star* or *Arkansas Writers' Project* with respect to a sales tax on *services* such as Cable News Network (CNN).

Jones News/Retrieval, an interactive electronic database that includes "on-line" versions of the *Journal*, the News Services, and many other publications, including those published by others, *e.g.*, *Business Week* and *The Washington Post*; Telerate, a leading provider of real-time financial news and information; *American Demographics* magazine; and, through Dow Jones' Ottaway Newspapers, Inc. subsidiary, newspapers in 29 communities in 13 states. Perhaps most intriguingly for present purposes, Dow Jones is the publisher of *Barron's National Business and Financial Weekly*, a tabloid-format journal printed on newsprint.

Dow Jones is thus keenly interested in the issue, raised in *Minneapolis Star*, 460 U.S. at 591-92, and *Arkansas Writers' Project*, 481 U.S. at 229-31, of whether (and when) a state may tax some members of the press but not others. Any definitive statement on this issue would have a substantial impact on Dow Jones as a taxpayer in various states.

SUMMARY OF ARGUMENT

In *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), this Court held that it was presumptively unconstitutional to tax the press in a manner different from other taxpayers, or to single out some portion of the press for taxation. In *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987) these rules were reaffirmed, and tax distinctions among publications based on content were condemned as particularly repugnant. While *Arkansas Writers' Project*, however, ostensibly reserved the question of whether a sales tax distinction between different types of periodicals was, by itself, constitutionally suspect, the language and logic of both *Minneapolis Star* and *Arkansas Writers' Project* compel an affirmative answer to this question. (Point I)

In any event, the most common sales tax distinction between different types of periodicals— that between sales of (taxable) magazines and (exempt) newspapers— is inevitably content-based, and thus forbidden by *Arkansas*

Writers' Project. This is revealed by an analysis not only of the dictionary definitions of "magazine" and "newspaper", which rely heavily on content analysis, but also of many states' sales and use tax statutes and regulations, which do so as well. (Point II)

Moreover, the persuasive weight of authority in the state courts, much of it quite recent, has found taxation of some types of press entities where other types are exempt presumptively unconstitutional, and the cases most directly on point here were overlooked by the court below. (Point III)

Once the rule of *Minneapolis Star* and *Arkansas Writers' Project* applies, this Court has held that differential taxation of the press can only be sustained on a showing of a compelling state interest, and a tax narrowly tailored to achieving that interest. This Court and the state courts have rigorously applied this standard. The standard cannot be met here— as the State appears, by silence, to concede. (Point IV)

ARGUMENT

I.

THIS COURT'S DECISIONS TEACH THAT TAX LAWS TREATING ONE SEGMENT OF THE PRESS LESS FAVORABLY THAN OTHERS ARE CONSTITUTIONALLY SUSPECT UNDER THE FIRST AMENDMENT.

In *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), this Court considered a Minnesota use tax on the cost of paper and ink products consumed in the production of a publication. This use tax was a specifically-enacted departure from the general scheme (in Minnesota, as in most states) of complementary sales and use taxes: There was no corresponding sales tax. In addition, Minnesota had an exemption amounting to an annual credit of $4,000 against the special use tax. The result of this credit was that fewer than five percent of the State's paid circulation newspapers were subject to tax liability, and that approximately two-thirds of the revenue generated by the tax came from a single taxpayer, Minneapolis Star and Tribune Co. 460 U.S. at 577-79. This Court held that the Minnesota scheme was doubly violative of the First Amendment. First, the Court held that it is presumptively unconstitutional to tax the press in a manner different from other taxpayers:

> "Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation."

460 U.S. at 585 (footnote omitted). Second, the Court ruled it was unconstitutional to target for taxation a subset of the press:

> "[R]ecognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme."

Id. at 592. It is this second holding which is implicated by this case.

This Court reached that holding based on the *potential* dangers of differential treatment:

> "A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected.
>
> * * *
>
> "[T]he very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but also with the possibility of subsequent differentially *more burdensome* treatment."

460 U.S. at 585, 588 (emphasis in original). *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) ("the power to tax is the power to destroy."). *See also Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943).

While we can rest secure in the knowledge that no legislature (or executive) will tax the press out of existence if it must levy the same tax on all enterprises, that security diminishes if the press can be made subject to special taxes. *Minneapolis Star*, 460 U.S. at 585. Following this logic, it is even more dangerous to permit some press entities to be subject to taxes not levied on others. In particular, local newspapers of general circulation retain considerable influence with local legislators (and such influence may even have grown as most local papers attain

monopoly status). But this influence may not accrue to other members of the press (or to the "national" media in various local contexts), who may therefore be more vulnerable to censorial taxation.[2] This is not merely a matter of theory: Retail newspaper sales are exempt from tax in many states where magazine sales are not exempt. *See* Point II, *infra*.

In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), the Court revisited many of the issues raised in *Minneapolis Star*, and reaffirmed its earlier holdings while somewhat clarifying their reach.

The *Arkansas Writers' Project* Court ostensibly reserved the question of "whether a distinction between different types of periodicals presents an additional basis for invalidating the sales tax, as applied to the press." 481 U.S. at 233. But *amicus* respectfully submits that the language and logic of the decision compel an affirmative answer to the question the Court reserved.

After all, the *Arkansas Writers' Project* Court held that,

> "Because the Arkansas sales tax scheme treats some magazines less favorably than others, it suffers from the second type of discrimination identified in *Minneapolis Star*."

481 U.S. at 229. *Amicus* submits that this statement of the law would be equally valid if the word "periodicals" (or "publications", or even "members of the press") were substituted for "magazines".[3] The question posed in

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[2]The taxpayer in *Minneapolis Star* was not obligated to show "any impermissible or censorial motive on the part of the legislature," 460 U.S. at 580, although, of course, any such showing would suffice to invalidate a tax. *Cf. Grosjean v. American Press Co.*, 297 U.S. 233 (936).

[3]*Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983) has been said to run counter to this argument. *Hearst Corp. v. Iowa Department of Revenue and Finance*, ___ N.W.2d ___ (Iowa Sept. 19, 1990), Slip op. at 18-19, 21-25 (relying on *Regan* to uphold tax); *Department of Revenue v. Magazine Publishers of America, Inc.*, 565 So.2d 1304, 1308 n.6 (Fla. 1990) (calling State's reliance on *Regan* misplaced);

Arkansas Writers' Project is thus answered by the same case: Treating some types of periodicals— newspapers— more favorably than others— magazines— is a basis for invalidating a sales tax scheme.

Southern Living, Inc. v. Celauro, 789 S.W.2d 251, 252 (Tenn. 1990), *cert. pending sub nom Commissioner of Revenue of Tennessee v. Newsweek, Inc.*, No. 90-273 (same); *Times Mirror Co. v. City of Los Angeles*, 192 Cal. App. 3d 170, 183 n. 8, 185, 237 Cal. Rptr. 346, 354-55 and n. 8 (1987), *app. dism'd*, 484 U.S. 1022 (1988) (relying on *Regan* to uphold tax). *See also* Petition for Writ of Certiorari in No. 90-273 at 11-13 (arguing for applicability of *Regan*).

As pointed out by the Florida Supreme Court, however, *Regan*, decided just two months after *Minneapolis Star*, makes no reference to the earlier case. The Opinion of the Court in *Arkansas Writers' Project*, in turn, makes no reference to the Opinion of the Court in *Regan*. This is because *Regan* belongs to a line of authority distinct from, and involving different First Amendment issues than those addressed in *Minneapolis Star* and *Arkansas Writers' Project*.

It is true that the *Regan* Opinion contains the sentence: "Generally, statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose." 461 U.S. at 547. But the Opinion also states, in the very next sentence: "Statutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right." *Id.*

Regan, dealing with a content-neutral subsidy of lobbying, was a "rational basis" case. But in matters such as the instant one, including *Minneapolis Star* and *Arkansas Writers' Project*, dealing as they do with the fundamental right of freedom of the press, this Court demands more:

> "A tax that singles out the press, or targets individual publications within the press, places a heavy burden on the State to justify its action."

Minneapolis Star, 460 U.S. at 592-93. *See also Arkansas Writers' Project*, 481 U.S. at 227, 231; *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-707 (1986); *Minneapolis Star*, 460 U.S. at 585 n. 7. *Regan* is inapposite here.

II.

THE MOST COMMON DIFFERENTIAL TAXATION OF THE PRESS— FAVORING NEWSPAPERS OVER MAGAZINES— IS CONTENT-BASED, AND THEREFORE CONSTITUTIONALLY IMPERMISSIBLE.

Arkansas Writers' Project involved Arkansas' sales tax, from which all newspapers and "religious, professional, trade and sports" magazines were exempt. 481 U.S. at 224. As a consequence, no more than three magazines (including appellant's general interest magazine, *Arkansas Times*), were actually paying Arkansas tax. *Id.* at 229 n. 4. This Court held that this scheme constituted differential taxation of the second type condemned by *Minneapolis Star*— and was even more constitutionally repugnant because the distinctions among publications were content-based. 481 U.S. at 229. *See also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 26 (1989) (White, J., concurring in the judgment); *id.* at 26 (Blackmun and O'Connor, JJ., concurring in the judgment).

The prohibition against content-based regulation was applicable in *Arkansas Writers' Project*, the Court noted, even though the regulation there tended to restrict entire topics of public discussion rather than particular *viewpoints* on those topics.

> "Nor are the requirements of the First Amendment avoided by the fact that Arkansas grants an exemption to other members of the media that might publish discussions of the various subjects contained in Arkansas Times. For example, exempting *newspapers* from the tax does not change the fact that the State discriminates in determining the tax status of *magazines* published in Arkansas. 'It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him.' *Regan*

> *v. Taxation With Representation of Washington*, 461 U.S. 540, 553 (1983) (Blackmun, J., concurring)."

Arkansas Writers' Project, 481 U.S. at 230-31 (emphasis in original) (statutory citation omitted).

As we will show, the single most common distinction among press entities for state taxation purposes— the taxation of magazines and tax exemption of newspapers— is *inevitably* content-based. Because this is so, differential taxation between newspapers, on the one hand, and magazines, on the other, cannot be sustained.[4]

Once a state undertakes to officially distinguish between, and classify, types of periodicals, content-based distinctions can hardly be avoided. Thus, an authoritative dictionary defines a "newspaper" as a publication that

> "*contains* news, articles of opinion (as editorials), features, advertising or other matter regarded as of current interest."

The same source further defines a "magazine" as a periodical that *contains* either,

> "a miscellaneous collection of articles, stories, poems, and pictures and is directed at the general reading public,"

or,

> "specific material directed at a group having a particular hobby, interest or profession (as education, photography or medicine) or at a particular age group (as children, teen-agers)."

Webster's Third New International Dictionary of the English Language Unabridged (1966) (emphasis added).

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[4]This argument was briefly raised, but not addressed, in *Arkansas Writers' Project*. 481 U.S. at 232-33.

While those wishing to determine whether a given publication is or is not a magazine may think they "know it when they see it," any serious analysis of this question must inevitably turn to the publication's *content*. Publications close to the "newspaper"/"magazine" line, such as Dow Jones' own *Barron's*, or *The Sporting News* or *The Village Voice*, should be sufficient on inspection to demonstrate this point.

In addition, many of the states that exempt "newspapers" from sales tax while continuing to tax magazines exclude "trade journals" or the like from the definition of newspapers. "Trade journals," the regulations almost invariably provide, are too "specialized"; they lack sufficient news of "general interest," or of interest to the "general public" to qualify for the newspaper tax exemption. Such "specialized" publications, if they wish to be tax-exempt, must contain as well "general news of the day." See Colo. Rev. Stat. §24-70-102, Reg. 34; Conn. Sales and Use Tax Manual, §20.6; D.C. Reg. §452.1; Ind. Admin. Code Tit. 45, r. 2.2-5-26; N.M. Gross Receipts Reg. 64:1; S.C. Reg. 117-174.166(3); Utah Admin. R. 865-19-655(A)(2); Wash. Admin. Code §458-20-143[5]; Wis. Stat. §77.51(8). Without doubt, this is content-based discrimination, and therefore "particularly repugnant" under *Arkansas Writers' Project*. *See also Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)("A determination concerning the newsworthiness [of a publication]... cannot help but be based on the content.... Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1975).

One state's treatment of the matter is illustrative. Connecticut has gone to the greatest pains to articulate the

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[5]Washington's Department of Revenue has announced its intention to amend this provision, but noted: "There has been no change in the position of the department that current events or news be the primary focus of the publication." Wash. Dep't of Rev., Excise Tax Rev. Policy Mem. No. 89-5 (Oct. 24, 1989).

distinction between newspapers (non-taxable) and magazines (taxable when sold at newsstands). The State's Sales and Use Tax Manual not only defines the statutory terms, but also lists each specific publication as to the status of which the Department of Revenue Services has ruled. Exempt "newspapers" include *Barron's, The Irish Echo, The Sporting News* and *The Village Voice.* With respect to certain "graphic publications," however, including *The National Enquirer* and *The Star,* no such exemption is available:

> "They do not contain reports of current events, current happenings and news of general and current interest but simply stories, articles, photographs, etc. designed for the entertainment for [sic] the general reader.
> "Although they have a newspaper format and appearance, *their contents and substance indicate they are magazines and not newspapers.*"

Conn. Sales and Use Tax Manual, §20.6 at 2 (emphasis added).[6]

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[6]In addition, because "magazine" *subscriptions* are not taxed in Connecticut, the State further classifies non-newspapers into "magazines" and other publications, the sale of which by subscription are taxable. The Sales and Use Tax Manual provides that "Professional Journals" and "Personal service publications" are not "magazines" because the latter are defined as "containing miscellaneous papers, critical and descriptive articles, stories, poems, etc. designed for the entertainment of the general reader." Conn. Sales and Use Tax Manual §20.6 at 2. The resulting classification is at once content-based and arbitrary, as the following examples illustrate:

"Magazines"	Not "Magazines"
Forbes	American Banker
Electrical World	Public Utility Fortnightly
Harvard Business Review	Connecticut Business Journal
Medical World News	Hospitals
Oil & Gas Journal	Chemical Monthly Reporter
Scientific American	Environmental Science & Technology

Id. at 3-4.

Judicial attempts to define "newspapers" and "magazines" in the context of differential taxation reveal the same sort of content-based distinctions. Most recently, the Supreme Court of Iowa considered a challenge by the publisher of 14 large-circulation magazines to the State's taxation of them while other publications were exempt. *Hearst Corp. v. Iowa Department of Revenue and Finance*, ___ N.W.2d ___ (Iowa Sept. 19, 1990).

The plaintiff-taxpayer's magazines, it pointed out, met all of the statutory "noncontent criteria" of the newspaper exemption. The Iowa Court did not deny this; instead, it noted cryptically:

> "We observe that although a publication may contain some of the noncontent criteria that distinguish a 'newspaper' from other publications that are taxable, it may still not qualify under the 'newspaper' exemption."

Hearst Corp., Slip op. at 9-10.[7] *See also, e.g., Jaguar Publications, Inc. v. Comptroller of the Treasury*, Md. Tax Rpts. (CCH) ¶ 201-328 (Md. Tax Ct. 1989) (holding a weekly "T.V. guide" an exempt newspaper because of its one-week "shelf life," and observing that "format alone is insufficient for classification."); *Aetna Adjustment Co. v. Washington Department of Revenue*, Wash. Tax Rpts. (CCH)¶ 201-150 (Wash. Bd. Tax App. 1975) (specialized daily publication held not a newspaper, and therefore taxable: "This information, although current, is not of general interest. The majority of subscribers are from six business classifications; subscription is based on a business interest in the recorded information.")

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[7]Conceding that "classification of the writing as news, articles of opinion," etc., *i.e.*, content analysis, "is a consideration" under Iowa's scheme, the court held that the rule of *Arkansas Writers Project* was avoided because, "the focus is not on the content of the journalism." *Hearst Corp.*, Slip op. at 17. In other words, while content-based discrimination is "particularly repugnant," a little content analysis should be acceptable. That is simply not the law.

Indeed, a number of the courts that have considered recent challenges to differential taxation of newspapers and magazines have recognized the content-based nature of this discrimination. *Newsweek, Inc. v. Celauro*, 789 S.W.2d 247, 249 (Tenn. 1990), *cert. pending sub nom Commissioner of Revenue of Tennessee v. Newsweek, Inc.*, No. 90-273 (newspaper exemption requiring that publication "must contain matters of general interest and reports of current events... is not a content-neutral requirement"); *Louisiana Life, Ltd. v. McNamara*, 504 So.2d 900, 906 (La. App. 1987) (rejecting regulations defining "newspaper" as resulting in discrimination based on "the content of the publication"). *See also Hearst Corp. v. Director of Revenue*, 779 S.W.2d 557, 559 (Mo. 1989) (Blackmar, C.J., dissenting) (sales tax on magazines but not newspapers "would discriminate between different kinds of print media by reason of their content, and so would violate the Constitution of the United States.")

As this Court held in *Arkansas Writers' Project*, such content-based schemes of taxation have no place in a system of government bound by the First Amendment.

III.

THE PERSUASIVE WEIGHT OF AUTHORITY IN THE STATE COURTS HAS FOLLOWED THIS COURT IN FINDING DIFFERENTIAL TAXATION OF PRESS ENTITIES CONSTITUTIONALLY SUSPECT.

In Point I we argued that the language and logic of *Minneapolis Star* and *Arkansas Writers' Project* compel the conclusion that a sales tax scheme which distinguishes between different types of periodicals is constitutionally suspect as applied to the press. Nearly all of the state courts that have considered the point agree. The issue was posed squarely in *Louisiana Life, Ltd. v. McNamara*, 504 So.2d 900 (La. App. 1987). In that case, the publisher of a bi-monthly magazine challenged a sales tax scheme from which newspapers, but not magazines, were exempted. The court upheld the challenge, declaring that,

> "An exemption which exempts some publications but not all publications constitutes an infringement of First and Fourteenth Amendment rights."

Id. at 902. It refused to permit the legislature to select "who may exercise First Amendment rights free of taxation, and who may not." *Id.* at 905.

In *Dow Jones & Co. v. Oklahoma ex rel. Oklahoma Tax Commission*, 787 P.2d 843 (Okla. 1990), the Supreme Court of Oklahoma agreed, holding that

> "a use tax levy on some but not all publications— based on sales price or mode of delivery— is an impermissible burden on rights protected by the First Amendment to the U.S. Constitution."

787 P.2d at 843. Oklahoma had exempted from a generally-applicable sales tax newspapers and periodicals sold by carrier as well as sales "where any individual transaction does not exceed seventy-five cents."

The Oklahoma court followed up on its ruling in *Dow Jones* in *Oklahoma Broadcasters Ass'n v. Oklahoma Tax Commission*, 789 P.2d 1312 (Okla. 1990), by striking down three taxes imposed on the broadcast press. The court invalidated taxes on:

- television broadcasters' revenues from licensing agreements— because newspapers' and radio broadcasters' revenues from similar agreements were exempt;

- broadcasters' advertising revenues— because newspaper, magazine and billboard advertising revenue was exempt;

- sales of broadcasting equipment— because most "manufacturing" equipment, including that used in the production of newspapers, was exempt.

Id. at 1314-15. Broadening its holding in *Dow Jones*, the Oklahoma court stated that,

> "a tax structure that exempts some but not all 'members' of the press from use and sales taxes impermissibly burdens rights protected by the First and Fourteenth Amendments to the United States Constitution."

Oklahoma Broadcasters, 789 P.2d at 1313.

Recently, the New York Court of Appeals summarily affirmed an intermediate appellate court opinion invalidating a state franchise tax levy because it was being applied in a manner more favorable to broadcasters than

print publishers. *Matter of McGraw-Hill, Inc. v. State Tax Commission*, 146 A.D.2d 371, 541 N.Y.S.2d 252 (3d Dep't 1989), *aff'd on opinion below*, 75 N.Y.2d 852, 552 N.Y.S.2d 915 (1990).

The decision of the court below is, of course, directly to the contrary. Indicating it was unaware of the earlier decisions by the New York Court of Appeals in *McGraw-Hill* and the Oklahoma District Court in *Oklahoma Broadcasters*, the Arkansas court refused to find that

> "the failure to tax newspapers in the same manner as radio broadcasts violates the First Amendment.... [W]e are unwilling to hold that all mass communications media must be taxed in the same way.... We must, however, hold that a tax which discriminates between mass communicators delivering substantially the same service runs afoul of the First Amendment."

Medlock v. Pledger, 301 Ark. 483, 487, 785 S.W.2d 202, 204 (1990). App. 7a.[8]

In just the few months since the decision below, the Supreme Court of Tennessee held in two cases that exempting newspapers but not magazines from the State's use tax violated the free press guarantees of both the federal and Tennessee Constitutions. *Newsweek, Inc. v. Celauro*, 789 S.W.2d 247 (Tenn. 1990), *cert. pending sub nom*

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[8]While this Brief does not directly address the issue of differential taxation involving regulated media, one difficulty of the approach taken by the court below, confining the rule of *Arkansas Writers' Project* to "mass communicators delivering substantially the same service", is that while the Arkansas court may consider satellite and cable television to come within such a rule, another court could view newspapers and magazines (in many ways, even more similar products) as "media sources of different types." *Hearst Corp. v. Iowa Department of Revenue and Finance*, ___ N.W.2d ___ (Iowa Sept. 19, 1990), Slip op. at 12. As pointed out above, to elevate such distinctions to constitutional magnitude is to invite the very sort of content-based discrimination that this Court has already declared to be "particularly repugnant." *Arkansas Writers' Project*, 481 U.S. at 229. *See* Pt. II, *supra*. *See also Finlator v. Powers*, 902 F.2d 1158, 1163 (4th Cir. 1990).

Commissioner of Revenue of Tennessee v. Newsweek, Inc., No. 90-273; *Southern Living, Inc. v. Celauro*, 789 S.W.2d 251 (Tenn. 1990), *cert. pending sub nom Commissioner of Revenue of Tennessee v. Newsweek, Inc.*, No. 90-273.

In *Department of Revenue v. Magazine Publishers of America, Inc.*, 565 So.2d 1304 (Fla. 1990), the Supreme Court of Florida as well declared that a statutory scheme taxing the retail sale of secular magazines but not of newspapers was unconstitutional:

> "*Ragland* clearly indicates that a state may not tax some types of magazines while exempting other types of magazines. The same first amendment concerns are present when a state tax scheme differentiates between different types of periodicals."

565 So.2d at 1307.

Finally, *Hearst Corp. v. Iowa Department of Revenue and Finance*, ___ N.W.2d ___ (Iowa Sept. 19, 1990), the most recent decision in this area, is to the contrary. But the Iowa court's analysis focused almost exclusively on the first prong of *Minneapolis Star*— special taxes on the press (of which the Iowa sales tax, exempting newspapers but not magazines from an otherwise generally-applicable tax, was certainly not one)— while largely neglecting the second prong: differential taxation among the press. Slip op. at 14-15. *Cf. Arkansas Writers' Project*, 481 U.S. at 228-29 (noting that State's arguments "address[ed] only the first type of discrimination," while statute failed to pass constitutional muster because of the second); *Village Publishing Corp. v. North Carolina Department of Revenue*, 472 U.S. 1001, 1002-1003 (1985) (White and Brennan, JJ., dissenting from

dismissal of appeal) (criticizing lower court decision which made same analytical error).[9]

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[9]The law on this issue in California is less than clear. *Times Mirror Co. v. City of Los Angeles*, 192 Cal. App. 3d 170, 237 Cal. Rptr. 346 (1987), *app. dism'd*, 484 U.S. 1022 (1988) involved a challenge by newspapers to a gross receipts tax scheme in which the print and broadcast press were treated identically, but where motion picture production was effectively taxed at a lower rate. While the court upheld this differential, it also noted that "those engaged in protected speech may not be singled out for discriminatory tax treatment in the absence of counterbalancing governmental interest of compelling importance that cannot be achieved without differential taxation." 192 Cal. App. 3d at 182-83, 237 Cal. Rptr. at 354. The only exception, according to the *Times Mirror* court, comes where "the tax measure does not result in a discriminatory burdening of First Amendment rights." 192 Cal. App. 3d at 183, 237 Cal. Rptr. at 354. But, of course, in *Minneapolis Star* this Court rejected any inquiry into the effective burden of the challenged tax. 460 U.S. at 589-90.

Adding substantially to the confusion is the fact that *Times Mirror* cited with approval but distinguished its sister court's decision in *City of Alameda v. Premier Communications Network, Inc.* 156 Cal. App. 3d 148, 202 Cal. Rptr. 684, *cert. denied*, 469 U.S. 1073 (1984). In *Premier Communications*, the court had invalidated a business license tax assessment that discriminated against Home Box Office because it was "unjustified by any compelling interest of the City." 156 Cal. App. 3d at 157, 202 Cal. Rptr. at 689. The *Times Mirror* court found the distinction between the business license tax in *Premier Communications* and a gross receipts tax (such as the one before it) significant because the former "grant[s] or take[s] away any right to do business." 192 Cal. App. 3d at 182, 237 Cal. Rptr. at 353. While it may be true that a tax "taking away any right to do business" in the First Amendment context constitutes an unconstitutional prior restraint, *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688, 694 (1990); *Minneapolis Star*, 460 U.S. at 586 n. 9, that does not make differential sales or use taxation constitutional. Indeed, the entire thrust of *Minneapolis Star* and *Arkansas Writers' Project* is to the contrary.

IV.

WHERE, AS HERE, THERE IS NO COMPELLING STATE INTEREST TO SUSTAIN IT, DIFFERENTIAL TAXATION OF THE PRESS MUST BE STRUCK DOWN.

Differential taxation among press entities is, of course, not altogether forbidden by *Minneapolis Star* and *Arkansas Writers' Project*. Rather, in order to sustain such a tax, a state must assert "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation," *Minneapolis Star*, 460 U.S. at 585, and must demonstrate that the tax "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project*, 481 U.S. at 231. *See also id.* at 235 (Stevens, J., concurring in part and in the judgment).

In *Minneapolis Star* this Court rejected two possible justifications for such taxation: the State's need for revenue, 460 U.S. at 586, and the desire for what Minnesota called an "equitable" tax system, placing the burden on large (although, as the Court pointed out, not necessarily more profitable) taxpayers. *Id.* at 591-92. The Court did not indicate what sort of rationale might meet its "compelling interest" test.

The *Arkansas Writers' Project* Court rejected a number of rationales proffered by the State in an attempt to meet *Minneapolis Star's* "compelling interest" test: not only the need to raise revenue, 481 U.S. at 231-32, but also a purported intent to encourage "fledgling" publishers, as well as the need to "foster communication" in Arkansas. *Id.* at 232.

The state courts have also considered— and rejected, *seriatim*— a host of "compelling interests" proffered in support of differential taxation of the press. In ruling in *Dow Jones* that the State had failed to meet its burden of

showing a compelling interest to justify the tax, the Oklahoma Supreme Court held,

> "a state's stake in orderly administration and efficient tax collection is not an interest separate and distinct from that in raising revenue. A convenient, problem-free collection system is merely the means to achieve the primary objective of raising funds."

Id. at 847. *Cf. Matter of Assessment Against Village Publishing Corp.*, 312 N.C. 211, 322 S.E.2d 155, 161-63 (1984), *app. dism'd sub nom Village Publishing Corp. v. North Carolina Department of Revenue*, 472 U.S. 1001 (1985) (upholding, after "rational basis" scrutiny, statute exempting sales of newspapers delivered by carrier or sold at newsstands, but not otherwise).

The Tennessee Supreme Court rejected that State's argument that a compelling governmental interest could be found in the "immediate provision of news," which, the State averred, was better advanced by newspapers than magazines:

> "There is nothing to suggest that newspapers require an exemption in order to furnish such immediacy in bringing the news to the public. Further, there is no basis for giving immediate news a privileged position over other avenues of news reporting which is accompanied by more deliberative analysis or commentary. *It is not a legitimate function of the government to decide which information furthers better the public interest.*"

Newsweek, Inc., 789 S.W.2d at 250 (emphasis added); *Southern Living, Inc.*, 789 S.W.2d at 253 (emphasis added). Similarly, an asserted public interest in "promoting publishers who engage in the immediate dissemination of news; in publishing news while it is new," was rejected by the Florida Supreme Court as not compelling, and possibly not even a rational basis. *Department of Revenue v. Magazine Publishers of America, Inc.*, 565 So.2d at 1308.

Finally, turning to the cases most closely analogous to this one, among the rationales held by the Oklahoma Supreme Court not to constitute a "compelling state interest" was the "higher degree of regulation" of the broadcast as opposed to the print media. *Oklahoma Broadcasters*, 789 P.2d at 1317. In New York, the intermediate court in *McGraw-Hill* said,

> "Respondent claims that the unique nature of the electronic [i.e., broadcast] media makes it more susceptible to governmental regulation and that there are many differences between the print and visual media. While that may be true, such an argument fails to show any compelling State interest in taxing the two types of media differently. Thus, the regulation must fall."

146 A.D.2d at 375, 541 N.Y.S.2d at 255 (citations omitted).

While it is, again, not the principal focus of this Brief, the point made in *McGraw-Hill* is precisely applicable in the instant case: the fact that certain news media may be more susceptible of governmental regulation, *e.g.*, with respect to scarce frequencies or the use of public rights of way, does not demonstrate a compelling interest in their services being taxed differently. No such showing of a compelling interest has been made here by the State of Arkansas.[10]

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[10]The Arkansas court did not, in fact, even undertake a compelling interest analysis, holding simply that discrimination between, for instance, newspapers and radio, was outside of the rule of *Minneapolis Star* and *Arkansas Writers' Project*. *Medlock v. Pledger*, 301 Ark. 483, 486-87, 785 S.W.2d 202, 204 (1990). App. 7a. Nor does Respondent in this Court seem to offer a "compelling interest" justification for this tax scheme. *See* Brief in Opposition to Petition for Writ of Certiorari at 2 ("This legislation, when viewed under the 'rational basis' test, survives this constitutional challenge.")

CONCLUSION

Justice Robert H. Jackson, in a passage cited in *Minneapolis Star*, once wrote:

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring), cited in *Minneapolis Star*, 460 U.S. at 585. Nowhere, of course, does this hold more true than when, as here, a fundamental right is at stake.

For these reasons, and those set forth above, *amicus curiae* Dow Jones & Company, Inc. respectfully submits that the free press guarantee of the First Amendment

mandates that the decision below of the Supreme Court of Arkansas be reversed to the extent it approved taxation of petitioners-taxpayers from and after July 1, 1989.

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Respectfully submitted,

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